United States

Circuit Court of Appeals

For the Ninth Circuit

CHESTER BANKS, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 10804

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The defendant was indicted in three counts of an Indictment. Count I accused the defendant with transfering one (1) Marihuana Cigarette not in pursuance to a written order of the person to whom such Marihuana was transferred and not on a form issued in blank for that purpose by the Secretary of the Treasury. This was on the 25th day of September, 1943.

Count II accused the defendant with transferring on the 10th day of October, 1943 two (2) Marihuana Cigarettes, not in pursuance of a written order of the person to whom such Marihuana was transferred and not on a form issued in blank for that purpose by the Secretary of the Treasury.

Count III charges the defendant on or about the 10th day of October, 1943 with having in his possession two (2) Marihuana Cigarettes not in pursuance of a written order form and without having registered and paid the special tax as required and imposed by law.

The jury returned a verdict of guilty on all three counts.

A Motion for a new trial was duly made (Tr. 5) and denied by the Court (Tr. 6). Judgment and sentence was entered and the defendant was sentenced to two years in the Penitentiary on Count I of the Indictment and two years on Count II of the Indictment. The sentence on Count II to run concurrently to the execution of the sentence on Count I of the Indictment. Sentence was suspended on Count III of the Indictment for a period of one year from the expiration of the sentence on Counts I and II of the Indictment (Tr. 8).

From this Judgment and Sentence this appeal is prosecuted.

The only evidence upon which the defendant was convicted was the testimony of two witnesses. The first, Townsend Davidson (Tr. 17) was charged with a violation of the law with reference to possession of Marihuana. He said that he had used Marihuana for about ten or twelve years. He stated that he had bought Marihuana Cigarettes from him on two occasions — in the latter part of September and in the first part of October he had purchased Marihuana Cigarettes from him.

The other witness was Leonard Love (Tr. 21) who also was indicted for possession of Marihuana and who said he gave some Marihuana to Davidson which he had gotten from the Defendant.

STATEMENT OF ASSIGNED ERRORS RELIED UPON

The Appellant will rely upon the following assigned errors set forth in the Transcript Page 42:

I.

The witness Townsend testified that he smoked a Marihuana Cigarette and Mr. Coles objected (Tr. 18) to his testimony with reference to the fact that the cigarette was

marihuana and the Court overruled the objections. A motion was made to strike the testimony of Mr. Townsend and the motion was denied. (Tr. 18). This was an error.

II.

The Court committed error in refusing to sustain the motion of Mr. Coles (Defense Counsel) made (Tr. 24) for a directed verdict as to Counts 1, 2, and 3 of the Indictment on the grounds that there was not sufficient evidence to go to the jury.

III.

The Court erred in failing to strike the testimony of the Witness Love after the motion to strike was duly made by Mr. Coles (Tr. 25). The motion was denied and exception taken (Tr. 28).

IV.

The Court erred in failing to sustain the motion of Mr. Coles made at the conclusion of the introduction of all the evidence the Court having stated "The record will show that it is renewed and the motion is denied and exception allowed."

V.

The Court erred in failing to grant the Defendant a New Trial after the motion for a new trial was timely made and argued to the Court.

VI.

The Court erred in not granting the Defendant's motion in arrest of Judgment.

ARGUMENT ON ASSIGNMENT OF ERROR I AND III

The appellant wishes particularly to call this Court's attention to the fact that this entire case consists of the testimony of two witnesses who are themselves, law violators, they also had not been sentenced, only one having entered a plea of guilty, the other having stated that he decided to enter a plea of guilty.

The particular point raised by these two assignments is the question of whether or not the testimony of these two individuals should stand on the question of sale and possession of Marihuana. Assignment I deals with the question of whether the objection of Counsel to the testimony of Townsend that it was Marihuana should have been sustained. The Court took the viewpoint that one

who had used Marihuana for 10 to 12 years ought to know what it was. It will be noted that the witness made no test of the so called Marihuana. The witness stated he made a purchase of Marihuana in the latter part of September but he didn't say he used it, tested it nor was the same offered in evidence.

While the Courts have held that addicts may testify concerning purchase of opium they have indicated that such testimony was admissible "where he mixed it with water and drank it," *Pennachio vs. United States,* 263 Fed. 66. This witness did not testify that he used the articles purchased and didn't state how he knew it to be Marihuana but just stated a conclusion which should have been stricken.

As to the second assignment of error that deals with the motion to strike the testimony of Mr. Love. He stated on cross-examination that he did not use Marihuana, that he had never smoked a Marihuana Cigarette (Tr. 22). Surely then the Court should have stricken his testimony because it is obvious that the Government did not prove any fact that would qualify this witness on the matter of Marihuana. The Court stated that he sustained the objections of Counsel when made but even though that may have been done, to continue to allow the witness to testify

about Marihuana, until qualified so to do, was the most apparent type of error. The Government argues that he (the witness Love) referred to "sticks" and not to Marihuana. The Court may read the record (Tr. 21-22) and see that the witness said "Davidson came to me and said Chester Banks sent him to get some Marihuana. I gave it to him and I had gotten it from Chester Banks." The "it" modified the Marihuana used in the previous sentence and it is facetious to argue that the witness, the Jury and everybody in the Court room didn't know just exactly what he meant. Only the Government attorney meant "sticks" it is argued. The failure to strike this testimony was error and highly prejudicial to the Defendant.

ARGUMENT ON ASSIGNMENT OF ERROR II

This assignment of error deals with the question as to whether or not there was sufficient evidence on Counts I, II, and III to present the case to the Jury.

The Court's attention is called to the fact that the physical evidence was not introduced in the trial. If the defendant was a dealer in Marihuana as is claimed by the Government, could not they have had a Government agent make a purchase and preserve the evidence for the jury? The evidence is that a man was arrested in February of

1944 for stealing a coat and jacket (Tr. 20) and he told the officers that he had some Marihuana in his room. Not that he had purchased this Marihuana from the defendant but he told the officers that he had purchased from the Defendant in September of 1943, when he had been drinking. Then the theft case was dropped and this witness became the Government's case against the defendant. He was a law violator in many respects. He was charged with possession of Marihuana, and was not sentenced at the time of his giving of the testimony. He had discussed the matter with the Government agents. All of these circumstances, the previous deal with the officers on the dismissal of the theft case, the inference that may logically be drawn that he was to be "taken care of" on his decision to plead guilty, all are facts which color his testimony to the extent that the Court should not have allowed it, not substantiated, to go to the jury.

The other witness didn't know what Marihuana was. Never used or smoked it and obviously wasn't qualified to testify concerning it. His testimony was biased by the fact that he had, according to his own admission, had a fight with the defendant. He had borrowed $125.00 from the defendant to get out of jail and he had never paid it back. "I hit him on the head which I had to do to stop

the fight and from that day to this we haven't spoken." (Tr. 23).

The source of all the evidence introduced was polluted by coming from the mouths of two confessed law violators both of whom "had their own ax to grind" and one of whom had had a violent quarrel with the defendant. Surely one's freedom should not be removed by evidence as unconvincing as this. The Court should have granted the defendant's motion for a directed verdict at the conclusion of the Government's case.

ASSIGNMENT OF ERROR IV, V AND VI

After the defendant testified, I think then the Court should have dismissed the action and sustained the motions.

The defendant operated a tavern in the colored district in Seattle. He had never been bothered or molested with reference to Marihuana. He did not use Marihuana or sell it or have it in his possession. The evidence shows there were raids in the district for Marihuana and many people were arrested in February, 1944. The defendant was not arrested until March, a month after Townsend was arrested and after Love was arrested.

Again it is urged that nowhere in the record is there any evidence of a substantial nature. It is urged that the entire evidence was too weak to have been submitted to the jury.

The meager evidence coming from a polluted source and from witnesses who have experienced antagonism toward the defendant, one witness an addict, the other a man who had hit the defendant with an ax, only creates in this writer's mind, as it must in this Court's, a suspicion.

This Circuit has already held that unless the evidence excludes all reasonable theory of the defendant's innocence the case should be reversed.

Lempie vs. U. S., 39 Fed. (2nd) 19;
Benn vs. U. S., 21 Fed. (2nd) 962;
Harling vs. U. S., 13 Fed. (2nd) 114;
DeLuca vs. U. S., 298 Fed. 412.
DeVilla vs. U. S., 294 Fed. 535.

Every other hypotheses but that of guilt was not excluded by the evidence.

The following is taken from *Salinger vs. U. S.*, 23 Fed. (2nd) 48:

"Unless there is substantial evidence of facts which

exclude every other hypotheses but that of guilt, it is the duty of the trial Judge to instruct the Jury to return a verdict for the accused, and where all the evidence is as consistent with innocence as it is with guilt, it is the duty of the Court to reverse the Judgment against the accused."

Union Pacific Coal Co. vs. U. S., 173 Fed. 737.
Vernon vs. U. S., 146 Fed. 121;
Nosowitz vs. U. S., 282 Fed. 578;
Sullivan vs. U. S., 283 Fed. 865;
Siden vs. U. S., 9 Fed. (2nd) 241;
Van Gorder vs. U. S., 21 Fed. (2nd) 939.

ARGUMENT ON ASSIGNMENT OF ERROR V AND VI

It is respectfully urged that the same argument advanced in the previous assignment of errors apply to assignment of error V and VI.

CONCLUSION

It is respectfully urged that the Court should have granted the motions for a directed verdict and the challenge to the legal sufficiency of the evidence and that the motion for a new trial should have been granted for the error in not striking the testimony of the witnesses who were not qualified to testify.

Respectfully submitted,

JEFFREY HEIMAN.